

EXHIBIT B

NOVEMBER 22, 2002

DOCKET NO. _____

JOINT CLEC COMPLAINT FOR POST-	§	
INTERCONNECTION DISPUTE	§	BEFORE THE
RESOLUTION WITH SOUTHWESTERN	§	
BELL TELEPHONE, L.P. AND REQUEST	§	PUBLIC UTILITY COMMISSION
FOR INTERIM RULING REGARDING	§	
DS1 UNE LOOP PROVISIONING	§	OF TEXAS
ISSUES	§	

**JOINT COMPLAINT AND REQUEST FOR INTERIM RULING OF
ALLEGIANCE TELECOM OF TEXAS, INC., BIRCH TELECOM OF TEXAS,
LTD, LLP, CAPITAL TELECOMMUNICATIONS, INC., CBEYOND
COMMUNICATIONS OF TEXAS, L.P. EL PASO NETWORKS, LLC, LOGIX
COMMUNICATIONS, NTS COMMUNICATIONS, INC., TEX-LINK
COMMUNICATIONS, INC., XO TEXAS, INC. AND XSPEDIUS
MANAGEMENT CO. SWITCHED SERVICES, LLC
FOR POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION
WITH SOUTHWESTERN BELL TELEPHONE, L.P.
REGARDING DS1 UNE LOOP PROVISIONING ISSUES**

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ATTACHMENTS:

1. List of Parties
2. SBC/Southwestern Bell “UNE DS1 INTERIM PROCEDURES,”
 dated October 7, 2002
3. SBC/Ameritech Accessible Letter No. CLECAM00-153 (October 27, 2000)
4. Affidavits:
 - Best - Allegiance Telecom of Texas, Inc.;
 - Samson and Sauder - Birch Telecom of Texas, LTD, LLP;
 - Dickson - Capital Telecommunications, Inc.;
 - Robinson - Cbeyond Communications of Texas, L.P.;
 - Manias - El Paso Networks, LLC;
 - Taylor - Logix Communications;
 - Sarchet - NTS Communications, Inc.;
 - Land - Tex-Link Communications, Inc.;
 - Krabill - XO Texas, Inc.; and
 - Gallagher - Xspedius Management Co. Switched Services, LLC.

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RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. AND REQUEST FOR INTERIM RULING REGARDING DS1 UNE LOOP PROVISIONING ISSUES	§	PUBLIC UTILITY COMMISSION
	§	OF TEXAS
	§	

JOINT COMPLAINT AND REQUEST FOR INTERIM RULING OF ALLEGIANCE TELECOM OF TEXAS, INC., BIRCH TELECOM OF TEXAS, LTD, LLP, CAPITAL TELECOMMUNICATIONS, INC., CBEYOND COMMUNICATIONS OF TEXAS, L.P. EL PASO NETWORKS, LLC, LOGIX COMMUNICATIONS, NTS COMMUNICATIONS, INC., TEX-LINK COMMUNICATIONS, INC., XO TEXAS, INC. AND XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC FOR POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE, L.P. REGARDING DS1 UNE LOOP PROVISIONING ISSUES

COME NOW Allegiance Telecom of Texas, Inc., Birch Telecom of Texas, LTD, LLP, Capital Telecommunications, Inc., Cbeyond Communications of Texas, L.P., El Paso Networks, LLC, Logix Communications, NTS Communications, Inc., Tex-Link Communications, Inc., XO Texas, Inc., and Xspedius Management Co. Switched Services, LLC. (collectively, the “CLEC Coalition,” or “Complainants”) and file this complaint for post-interconnection dispute resolution with Southwestern Bell Telephone, L.P. (“SWBT”) pursuant to P.U.C. PROC. R. 22.326, and request for interim ruling pursuant to P.U.C. PROC. R. 22.328. The Complainants’ and SWBT’s contact information is provided, for purposes of P.U.C. PROC. R. 22.326(a)(1)(A), as Attachment 1 to this Complaint.

In this complaint, the CLEC Coalition requests that the Commission rule that SWBT’s new policy -- by which it refuses to provision CLEC requests for UNEs based on “no facilities” - - violates the nondiscrimination requirements in federal and Texas law, violates the Interconnection Agreements between SWBT and each complainant CLEC, and violates the

commitments SWBT made to obtain authority to provide in-region interLATA services. To remedy the harm these violations have caused, Complainants request reimbursement of the sums they paid associated with obtaining special access circuits from SWBT when SWBT illegally claimed no facilities were available to fulfill DS1 UNE orders, and request that SWBT be required to convert special access orders to DS1 UNE loops immediately and/or process the DS1 UNE loop orders that were improperly refused. Consistent with this request, the CLEC Coalition asks that the Commission issue an interim ruling prohibiting SWBT from implementing its new policy and requiring that it continue providing DS1 UNE loops under the same process SWBT used prior to October 2002.

I. INTRODUCTION

In October 2002, SWBT unilaterally imposed a new provisioning procedure that has severely diminished Texas CLECs' ability to serve customers using DS1 unbundled network element ("UNE") loop facilities. Without providing notice to CLECs, SWBT began to operate under new internal procedures for conditioning and provisioning DS1 UNE loop facilities. The new procedures change SWBT's long-standing practice on when DS1 UNE loop orders will not be provisioned because, according to SWBT, "no facilities" are available to fulfill the orders.

The efficient ordering and provisioning of DS1 UNEs is essential to local competition in Texas. Many CLECs use DS1 loops to connect CLEC facilities to customer premises. The DS1 UNE loop is critical to CLECs' ability to offer, for example, integrated voice and data products and other broadband products to customers at a competitive price. In the segments of the local service market in Texas where many CLECs are experiencing the most success, the DS1 UNE is a critical component of CLEC business plans. Without access to a cost-based DS1 UNE, CLECs

cannot compete in the “T-1” services market historically dominated by SWBT, and cannot continue their efforts offer broadband and voice services bundled over a DS1 UNE loop. Moreover, CLECs also cannot compete with the integrated voice and data products SWBT has recently debuted – products SWBT introduced specifically to compete with innovative CLEC offerings.

Texas CLECs felt the business impact of SWBT’s abrupt and unannounced change in DS1 UNE loop provisioning immediately and dramatically. CLECs accustomed to having approximately one to five percent of their orders returned each month with Jeopardy Codes that include a SWBT explanation of “no facilities” or “lack of facilities” (“LOF”) suddenly saw up to one-third of their orders returned unfulfilled for that reason. SWBT offered no explanation of the sudden increase in the rate of LOF failures and, as discussed herein, often refused to explain its new policy when CLEC representatives followed up to address the issue. Only after numerous CLECs made concerted efforts to investigate the spike in “no facilities” determinations did SWBT release a trickle of information revealing its change in procedures.

At the same time, some CLECs found that SWBT would readily provision the same circuits that were rejected as DS1 UNEs, but only if the CLEC ordered the circuits under SWBT’s special access service tariff. CLECs who had committed to customers to provide service by a date certain were compelled to fulfill their commitments by using SWBT’s special access service. As the Commission is aware, special access service is available only for a substantially higher price than that charged for a DS1 UNE loop, even though both provide the same network functionality. The “no facilities” problem for a UNE often appears to be no problem at all when the CLEC, or any other customer, orders the same circuit as special access.

As detailed herein, SWBT's new DS1 UNE procedures are contrary to: (a) section 251(c)(3) of the federal Telecommunications Act of 1996 ("FTA")¹ and the FCC rules implementing it; (b) the competitive safeguards of the Public Utility Regulatory Act ("PURA")²; and (c) SWBT's commitments to this Commission and the FCC made during the FTA § 271 process that resulted in SWBT's entry into the Texas interLATA services market. The evidence in this proceeding will demonstrate that SWBT's newly implemented restrictions on UNE provisioning should be prohibited under both federal and state law and policy.

While this dispute resolution proceeding is pending, it is extremely important that SWBT be restrained from continuing to limit access to DS1 UNEs by unilaterally imposing its new "no facilities" procedures. An interim ruling under P.U.C. Proc. R. 22.328 is necessary pending resolution of this dispute because SWBT's new procedures preclude the ability of the Complainants to provision scheduled service. When a CLEC receives a "no facilities" report from SWBT in response to its loop order, it cannot timely provision scheduled service to the customer whose service required use of the loop. The CLEC must either cancel the customer's order, or fulfill the order using SWBT's special access service. The extremely high, non-cost-based rates charged for special access, however, significantly inflate the CLEC's cost of providing service to its customer – and may make the service offering so uneconomic as to force the CLEC to cancel it. SWBT's policy, which forces CLECs to rely increasingly on special access, threatens to drive facilities-based CLECs out of the small business sector altogether. CLECs cannot offer profitable products to, for example, a five-line small business customer if its cost of service includes a special access circuit. In addition, SWBT's failure to articulate the

¹ Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).

² Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-63.063 (Vernon 2001) (PURA).

content of its procedures leave CLECs playing roulette with each DS1 UNE loop order they submit; SWBT has injected uncertainty into a business practice that is critical to the daily functioning of competition in Texas and that, prior to October 2002, was working efficiently.

The CLECs urge the Commission to issue an interim ruling that SWBT revert to the DS1 UNE provisioning practices in place prior to the implementation of the new procedures that caused the surge in provisioning failures due to “no facilities” determinations over the last six weeks. The CLECs request that SWBT be required to provision and condition DS1 UNE loops in the same manner they have been provisioned and conditioned since 1996. The interim ruling will not harm SWBT, but rather will hold SWBT to the commitments it made regarding loop provisioning at the time it was allowed to enter the interLATA market. Interim relief will permit the parties to operate under procedures that have been the “status quo” since the passage of the FTA while the Commission fully reviews the issues raised in this proceeding.

II. FACTUAL BACKGROUND AND DESCRIPTION OF EFFORTS TO RESOLVE DIFFERENCES BY NEGOTIATION

The Complainants all provide various services that rely on availability of SWBT UNE loops. In particular, the CLECs regularly order four wire loops that are conditioned to transmit the digital signals needed to provide service at DS1 signal levels. SWBT’s obligation to provide DS1 UNE loops in Texas was established in the first Mega-Arbitration, and is included in the interconnection agreements entered into by all of the Complainants.³ Since the CLECs rely on DS1 UNE loops for delivery of customer services, the process for ordering and provisioning loops is a critical business issue.

³ The Complainants are all parties to interconnection agreements with SWBT. El Paso Networks, LLC operates under the interconnection agreement originally approved by the Commission in Docket No. 17922 (the Waller Creek proceeding). Xspedius Management Co. Switched Services LLC operates

SWBT's DS1 UNE Loop Provisioning Procedures Before October 2002.

The procedures established by SWBT for CLEC loop ordering and provisioning have worked in essentially the same way since the DS1 UNE loop became available after the first Mega-Arbitration. Changes in the procedures primarily have involved refinements in measuring performance and communicating the status of orders. For the most part, these changes were due to commitments SWBT made to meet the FTA § 271 checklist requirement regarding provision of local loops.⁴

When a CLEC submits an order for DS1 UNE loops, it typically receives from SWBT a Firm Order Commitment (“FOC”) that identifies the date when the order will be completed. If SWBT finds it will not complete the order by the due date, it reports this information to the CLEC, using Missed Reason Codes (also known as Jeopardy Codes) that explain the reasoning for the performance failure. Even if a Jeopardy Code is issued, SWBT still typically commits to completing the DS1 UNE order by a date that, while later than the CLEC expected, is still a date certain.

When SWBT responds to an order with a Jeopardy Code claiming “lack of facilities” (“LOF”) or “no facilities,” however, the provisioning process, for all practical purposes, grinds to a halt. SWBT does not formally “cancel” the UNE order, but it responds with a due date so far in the future that, for practical purposes, the CLEC will not be able to respond to its commitment to its customer. For example, recent “no facilities” responses from SWBT have included “due dates” of June 2003. The CLECs are unaware of any customers who are willing to

as successor to the SWBT/e.spire agreement, which is based on the AT&T agreement approved in the Mega-Arbitration. The other Complainants are parties to the Texas 271 Agreement (“T2A”).

⁴ FTA § 271(c)(2)(B)(iv), item 4 of the competitive checklist, requires that a Bell Operating Company provide “local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”

wait eight months for new service. SWBT's responses thus make provisioning of the DS1 UNE loop impossible on any realistic business basis. If the new "due date" is not acceptable to the CLEC, SWBT requires that the CLEC, rather than SWBT, cancel the UNE order.⁵ When no facilities are available to complete a UNE order, SWBT's position is that it has no obligation to undertake "special construction" to complete the order as a UNE. In SWBT's view, the order falls out of the UNE category altogether when the order is returned LOF. SWBT contends that this relieves it of its legal and contractual obligations to timely provision the loop and charge a cost-based UNE rate for it. According to SWBT, the CLEC's only options when the order is returned as LOF are to request provisioning of the circuit through the "special request" process of the CLEC's interconnection agreement (as a "new" UNE) or to purchase the loop functionality out of the tariff.

SWBT refusal to provision DS1 UNE loop orders based on lack of facilities has not historically presented a major systemic problem for competition in Texas. CLECs recognize that occasional loop orders may be placed to locations where SWBT does not currently have facilities. CLECs have not expected SWBT to engage in construction activities such as trenching streets and pulling cable as part of the UNE ordering process. Thus, while the Complainants have experienced LOF order returns since the inception of UNE ordering and provisioning, they did not present a substantial problem for most CLECs. For example, the Complainants in this proceeding received LOF order returns on only between one and five percent of their orders during the period of April to September 2002. This low rate of LOF

⁵ Since this procedure does not result in SWBT-generated "missed due dates" under the Performance Measures ("PM") regime, the PMs will not reveal the impact of SWBT's policy change. When a CLEC is forced to resort to special access to provide scheduled service, SWBT reports, for PM purposes, that the CLEC cancelled its DS1 UNE loop order. The relevant PMs therefore do not capture the impact of SWBT's new procedures on DS1 UNE loop provisioning. This issue is discussed in more detail herein and in the accompanying Affidavit of Tad J. Sauder.

returns is consistent with what the CLECs have experienced historically. Moreover, in the past, even when LOF rejections occurred, the DS1 UNE loops typically were provisioned. Due dates were later than requested, but ultimately the UNE was put in service in a timely manner. CLECs were not given the impossible “due dates” months in the future that have been generated by SWBT’s new procedures.

While CLECs expect occasional LOF order returns from the SWBT UNE ordering process, CLECs also expect that loops will be provisioned and conditioned for use as UNEs just as they would be if SWBT was using the loop to serve its own customers. The provisioning of DS1 UNE loops has always involved various types of conditioning necessary to make the loop ready to provide digital services. In fact, the FTA and FCC rules and orders (discussed in detail below) require SWBT to “take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities.”⁶ In compliance with these requirements, SWBT’s policy – at least as communicated to CLECs since 1996 – has been to perform the modifications needed to provision a DS1 UNE loop, while rejecting for lack of facilities only in the event that no cable or copper pairs are available to fill the CLEC’s order.

New Procedures Immediately Cause A Spike In SWBT Refusal to Provision Due To “No Facilities” Claims.

SWBT’s DS1 UNE loop provisioning practices changed dramatically in early October 2002. CLECs ordering DS1 UNE loops began to have extremely high numbers of orders returned as LOF. As documented in the Affidavits attached to this Complaint, CLECs began to receive LOF reports for, depending on the company, 20% up to 29% of all DS1 UNE loop

⁶ See *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, , CC Docket No. 00-65, Memorandum Opinion and Order, , 16 FCC Rcd 15435, ¶ 248 (rel. June 30, 2000) (“*Texas 271 Order*”).

orders. The affected CLECs contacted SWBT account representatives to investigate the cause of the increased LOF order returns, and some CLECs raised the issue in the CLEC Users Forum. While the CLECs received various responses, with one exception the common denominator was an evasive refusal to provide a written explanation for the accelerated rate of LOF returns.

The CLECs have found it challenging to identify the exact nature of the dispute with SWBT because SWBT account representatives and executives have given different explanations for the LOF spike to CLEC representatives. Nevertheless, two clear problems have emerged. First, SWBT asserts that there is not a problem, and has been unwilling to negotiate a solution that will address the extraordinary increase in its refusal to provision due to “no facilities.”. Rather, SWBT contends that its failure to provision is legally justifiable and that there is nothing for SWBT to negotiate. In addition, SWBT has made clear that it plans to expand its new procedures affecting DS1 UNE loops to DS0 loops as well.

Second, the new internal procedure imposed by SWBT results in unprecedented restrictions on the conditioning and provisioning of DS1 UNE loops. SWBT did not announce this policy to the CLEC community, nor has it issued an Accessible Letter or other normal change management document to memorialize it. The CLECs are aware of the procedure only because of repeated requests directed to SWBT, and the fact that one CLEC was able to obtain a document from SWBT that describes the new procedure. The document, entitled “UNE DS1 Interim Procedures” is a SWBT Construction and Engineering (C&E) Method and Procedure dated October 7, 2002. It is attached to this Complaint as Attachment 2. The new procedure provides that:

Effective immediately, all DS1 UNE requests that meet any one of the following criteria will be returned to CPC with the instructions for them to return the order to the LSC because no facilities are available and we will not construct facilities for UNEs.

1. Physical construction or “energizing” of copper facilities will be necessary to provide the service.
2. Turn up of a new pair gain system or premise MUX (e.g. FLM 150) will be necessary to provide the service.
3. Placement and splicing of a new repeater case or doubler will be necessary to provide the service.
4. Splicing of an existing repeater case or doubler will be necessary to provide the service.

While SWBT’s procedure unilaterally imposes new restrictions on UNE provisioning, it also recognizes that other conditioning tasks still must be performed. “[W]e will continue,” the procedure states, “to perform ‘simple’ rearrangement and bridged tap and load coil removal for DS1 UNEs.” The unidentified author in the Construction & Engineering department opines that SWBT recovers “our costs for these modifications,” and directs that DS1 UNEs in such circumstances “will be constructed in the field just as we would construct DS1s for our retail service.” If the conditioning tasks include those listed in Items 1-4 above, however, the CLEC is to be told that “no facilities are available” and SWBT will not construct as it would for its own retail service.

SWBT’s Procedures Distort the “No Facilities” Designation.

While the interconnection lexicon includes many terms that do not have the meaning suggested by their plain language, SWBT’s new “no facilities” definition borders on the surreal. SWBT’s procedure attempts to expand the “no facilities” designation to cover situations where the loop facilities are undoubtedly in place, and only standard modifications are necessary to deliver the requested service. In fact, SWBT makes clear that it is actually refusing to grant CLECs access to the facilities already in place. For example, even if a repeater case or doubler is already in place (as well as the copper loop itself), SWBT will refuse to make the splice necessary to put the loop into service. All the “facilities” needed to provide the service are in

place, yet SWBT will refuse to provision the loop order based on “no facilities” being available. SWBT’s procedure lumps together situations where SWBT has no copper, fiber, or other loop facilities in the area with situations where all that is necessary to provision a DS1 UNE loop is normal make ready tasks such as turning up pair gain systems or splicing in repeater cases. Considering the amount of normal conditioning work excluded by SWBT’s new procedure, it is not surprising that implementation of the procedure resulted in a substantial jump in the number of LOF order returns issued to CLECs.

As SWBT began to reveal the terms of its new DS1 UNE procedures,⁷ it creatively asserted that the policy was not “new,” but rather reflected an effort to implement what had always been SWBT policy. The CLECs find this characterization as disingenuous and surreal as the expanded “no facilities” designation. SWBT has been provisioning DS1 UNE loops for six years using essentially the same criteria for determining when it is appropriate to return an order as LOF. SWBT’s unilateral policy change has had a material and detrimental effect on CLECs’ ability to serve customers using DS1 UNE loops.

The Complainants are confident that it is the new procedure, rather than a spate of orders to “green field” locations, that has caused the spike SWBT’s refusal to provision DS1 UNE loops.. This is demonstrated most clearly by SWBT’s ability to rapidly substitute its high priced tariffed special access service to the same locations where it claims “no facilities” are available for DS1 UNE loops. As described in the attached affidavits of XX, some CLECs faced with LOF order returns – and with impending due dates for service to high capacity customers –

⁷ Notably, the Construction & Engineering M&P stated: “This document will be used as an interim set of guidelines for the Construction and Engineering (C&E) organization dealing with the conditioning and provisioning of DS1 UNE facilities. A final document will be issued by Product Management to cover all departments.” Attachment 2, at 1. The CLECs have not received a copy of the “final document” referenced in the interim procedures. As of the date of this filing, most CLECs have not been allowed to review the interim procedures SWBT is applying to their UNE orders.

placed orders for SWBT's tariffed special access service to the same customer locations where SWBT refused the UNE orders.. SWBT was able to provision special access without a hitch. While SWBT claimed "construction" or "build out" was necessary to provision a DS1 UNE loop to a particular location, SWBT could install the same functionality via special access service within an average of five to seven business days after receipt of the special access orders. In fact, the installation intervals for the special access circuits were no longer than the average installation interval for a DS1 UNE loop.

III. REQUEST FOR INTERIM RULING

As noted above, CLEC communications with SWBT demonstrate a distinct lack of willingness to negotiate a resolution of this dispute. The CLECs have filed this Complaint because the issues involved directly and significantly affect their ability to provision scheduled service to customers. An interim ruling pending dispute resolution is therefore appropriate under P.U.C. PROC. R. 22.328(a). SWBT's new procedure, as long as it is allowed to remain in effect, imposes a discriminatory, anti-competitive restriction on the CLECs' rights to serve Texas customers using DS1 UNE loops, and will prevent CLECs from exercising their contractual rights to serve customers using UNEs. An interim ruling is essential to maintain CLECs' ability to provision UNEs while the parties' disputes are resolved.

The CLEC Coalition respectfully requests that SWBT be ordered to reinstate the DS1 UNE loop conditioning and provisioning procedures that were in practice prior to its recent institution of the "UNE DS1 Interim Procedures" reflected in SWBT's Construction and Engineering Methods and Procedures and in various communications with CLECs. If SWBT claims, as it has so far, that no policy change has occurred (and thus there is nothing to reinstate), the CLEC Coalition requests a ruling that SWBT treat "no facilities" determinations for DS1

UNE loop orders the same way it would if the order was for a SWBT retail DS1-level service or for SWBT's special access service. In addition, when a CLEC has been forced to order special access due to imposition of the new "no facilities" procedures, the CLEC should be reimbursed for all additional costs associated with ordering and using the special access circuit that would not have been incurred if the CLEC's DS1 UNE loop order had been properly fulfilled, and that the special access circuit be converted immediately and at no additional cost, for all purposes, to a DS1 UNE loop. If the CLEC did not order special access when its order was returned LOF, the CLEC should be permitted to re-submit the DS1 UNE loop order and SWBT should be required to provision it on an expedited basis.

If the Commission requires that SWBT follow this principle of parity, it would return the provisioning of DS1 UNE loops to the status quo as it was before SWBT's new process took effect. The "UNE DS1 Interim Procedures" include an interesting statement relevant to this point. The document notes that each of the UNE "DS1 services is subject to the basic design criteria we perform every day in constructing DS1s. ... From an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs." Up until the recent policy change, it was the CLECs' understanding that this principle governed all SWBT provisioning of DS1 UNEs. The CLECs believed that for SWBT, all DS1 orders were supposedly placed in a single pile, and were worked by SWBT personnel on a parity basis whether they were for UNEs, special access, or SWBT retail high-capacity services. This parity principle is fundamental to SWBT's compliance with federal and state law, with its interconnection agreements, and with its interLATA entry obligations regarding loop provisioning. SWBT was operating based on parity not just as a matter of practice, but because that is what the law requires.

The new procedures segregate UNE orders for special, unequal treatment with other DS1 loop orders, to the extreme detriment of the CLECs who order UNEs. Parity treatment has been replaced by an active discrimination that places new roadblocks in the path of only CLEC orders. CLECs need certainty that SWBT will meet its statutory, regulatory and contractual obligations to provide nondiscriminatory access to UNE loops. CLECs have based their business plans and designed their networks on this reasonable expectation. For SWBT to change its DS1 loop provisioning procedures now, two and one-half years after receiving interLATA authority under FTA § 271 and less than a year before the expiration of the T2A, is unconscionable and will result in irreparable harm for CLECs in Texas.

As shown by the CLECs' affidavits, SWBT's refusal to provision DS1 UNE loop orders has a devastating impact on CLECs' ability to provide service to new and existing customers. CLECs in Texas have already lost customer orders due to their inability to provision cost-based DS1 UNE loops. When SWBT returns a DS1 UNE loop order due to "no facilities," CLECs have only two choices: (1) cancel the order and resubmit it at a later date when facilities may (or may not) be available, or (2) cancel the order and resubmit it as an order for special access facilities. Both of these options significantly hurt CLECs' ability to provide timely, reliable service to their customers, at competitive rates.

Under the first option, the CLEC is put in the position of having to inform its customer that it cannot commit whether or when it can deliver service to the customer because it cannot obtain a commitment date from SWBT as to if and when a DS1 UNE loop will be available. In contrast, a customer ordering a DS1 directly from SWBT would not experience a "no facilities" problem because SWBT will build for its retail customers.

Under the second option, the CLEC may be able to obtain a special access circuit to deliver its integrated voice/high speed data product to its customer in a more timely fashion, but it is forced to pay SWBT significantly higher recurring and nonrecurring rates for the special access circuit than it would pay for a DS1 UNE. This seriously hinders CLECs' ability to offer their customers a competitively priced high capacity broadband service. In addition, the process of having to cancel the UNE order and resubmit it as a special access order significantly prolongs the provisioning intervals, resulting in customer inconvenience and frustration.

These scenarios leave no doubt that SWBT's new "no facilities" procedures will significantly decrease customers' willingness to order service from a CLEC instead of SWBT. If SWBT's UNE provisioning policies create a situation in which customers can almost always receive service faster and more reliably from SWBT, telecommunications competition in Texas will cease to exist. As SWBT offers its own version of integrated voice and data products, this problem becomes more acute. The harm suffered by CLECs cannot be repaired by monetary penalties or damages. Once customers form an opinion that a CLEC is unable to provide timely, reliable service, the CLEC's reputation and business is irreparably harmed.

SWBT will not be harmed by being required to abide by the parity-based provisioning and conditioning procedures that it has had in place since 1996. Rather, as discussed below, SWBT merely will be required to meet the commitments required by state and federal law and FCC and Commission orders and rules. If SWBT wants to argue for restrictions on UNE availability (again), CLECs should not bear the burden of SWBT's choice of tactics. While the Commission considers the merits of SWBT's latest effort to restrict UNE availability in Texas, CLECs should be allowed to continue business as usual under their interconnection agreements. Since SWBT has already acted unilaterally to alter the long-standing status quo, an interim ruling

is the only path available to prevent CLECs from being unable to provision scheduled service to Texas customers.

IV. SWBT'S NEW DS1 UNE LOOP PROCEDURES VIOLATE ITS OBLIGATIONS UNDER FEDERAL AND STATE LAW, ITS COMPLIANCE WITH THE § 271 COMPETITIVE CHECKLIST, AND THE TERMS AND CONDITIONS OF ITS INTERCONNECTION AGREEMENTS.

SWBT's new DS1 UNE loop procedure is a substantial departure from its past practices. Notably, SBC has implemented the new procedures only in the five SWBT states, where the company has already been granted interLATA authority. In the Ameritech region, as discussed below, SBC has acknowledged its obligation to perform the same routine network modifications and upgrades that in Texas now generate a "no facilities" order return. In any event, SWBT's new procedures should not be allowed to continue in effect in Texas, or any other state, because they violate SWBT's legal obligations to provide nondiscriminatory access to UNEs generally and, in particular, to unbundled local loops.

As the Commission considers the legal defects of SWBT's new procedures described in the following section, the CLEC Coalition urges that the Commission not lose sight of the disastrous policy consequences of SWBT's latest anti-UNE endeavor. SWBT's decision to limit the availability of DS1 UNE loops is nothing short of astounding as a policy matter, given that it comes concurrent with SBC's vociferous objections to availability of the UNE-Platform. At the same time SBC savages UNE-P providers for "not investing" in telecom infrastructure,⁸ it also

⁸ It is difficult to watch television in Texas these days without seeing SBC's attack ads, aimed at its competitors who are allegedly not "real phone companies." Most recently, SBC has begun to urge the FCC to adopt a "transition plan" that will eliminate the availability of UNE-P for business customers and charge a higher-than-retail rate for UNE-P providers serving residential customers. *See, e.g.*, SBC Memorandum of Ex Parte Communication filed with the FCC on November 19, 2002 in CC Dockets 01-338, 96-98 and 98-147.

attacks the very CLECs who have invested in their own switching facilities, by unilaterally limiting their ability to reach customers using UNE loops. The Complainants *already* own and operate telecom facilities and, yet, SWBT is attacking them by changing its long-standing parity policy related to DS1 UNE loop provisioning. Limitations on the use of one of the bedrock network elements, the UNE loop, will frustrate the very type of competition SBC claims it supports. Did SWBT really think no one would notice that its policy positions, taken together, would lead only to one end, the elimination of its CLEC competitors of every type?

A. Nondiscriminatory Access to UNEs Under Federal Law Requires SWBT to Modify its Network if Needed to Provide CLECs with DS1 UNEs in a Condition Suitable for the Provision of Service.

When Southwestern Bell provides a UNE to a CLEC, it must offer that UNE with the same capabilities, at the same level of quality, and under the same conditions, as it provides to itself when it uses that same element in providing services over its network. These duties arise under section 251(c)(3) of the FTA, which imposes a duty on ILECs to provide CLECs “nondiscriminatory access to network elements on an unbundled basis ... on rates, terms and conditions that are just, reasonable, and nondiscriminatory.” Based on this statutory command, sections 51.307, 51.311 and 51.313 of the FCC’s rules require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. The requirement for nondiscrimination specifically applies to all the inherent features of the element,⁹ the quality of the element,¹⁰ and the terms for

⁹ 47 CFR §51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of Sections 251 and 252 of the Act, and the Commission's rules.

access to the element.¹¹ Similarly, federal courts have found that under the FTA and FCC rules, ILECs must modify and upgrade their networks in order to afford CLECs nondiscriminatory access to UNEs whenever the ILEC performs the same functions for its retail customers. Thus, under the broad and unequivocal nondiscrimination requirement set forth under the FTA, SWBT has an obligation to modify its existing loop plant to afford CLECs access to DS1 UNE loops, and its new procedures plainly violate that obligation.

The requirement that ILECs provide CLECs nondiscriminatory access to UNEs means that the ILEC must make UNEs available to CLECs for the CLECs to use in providing a finished telecommunications service, on similar terms, at the same level of quality and within a similar

(b) The duty to provide access to unbundled network elements pursuant to Section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and Section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

¹⁰ 47 CFR §51.311 Nondiscriminatory access to unbundled network elements.

(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.

(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

¹¹ 47 CFR §51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

time frame as the ILEC affords itself access to those same elements in order to provide the ILEC's own customers with finished services. Under this analysis, federal law has consistently required ILECs to modify their network elements in order to allow CLECs access to the "features, functions, and capabilities" of those loops. As an example, the FCC determined that ILECs must remove load coils, bridged taps and other devices from copper loops in order to make the full functionality of the loop available to competitors.¹² The FCC has further stated that under its current rules, ILECs may not deny access to a loop UNE if there is no multiplexing equipment attached to the loop facility. Instead, the FCC found that the ILEC "cannot refuse to provision a particular loop by claiming that multiplexing equipment is absent from the facility. In that case, [the ILEC] must provide the multiplexing equipment, because the requesting carrier is entitled to a fully-functioning loop."¹³

Similarly, the Michigan PSC found, and the federal district court agreed, that an ILEC is obligated to install SONET electronics to provision a request for unbundled transport even in situations where the existing multiplexing capacity attached to the UNE was insufficient to handle the CLEC request.¹⁴

¹² *Local Competition Order, UNE Remand Order.*

¹³ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, ¶ 499, n.1658 (Chief, Wireline Competition Bureau rel. July 17, 2002) ("*Virginia Arbitration Order*").

¹⁴ *WorldCom Tech., Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000) (ordering Ameritech), *aff'd*, *Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002); *See U.S. West Comm. Inc.*, Docket Nos. UT-003022 & UT-003040, Commission Order, 2001 WL 1672340 *12 (Wash. U.T.C. July 24, 2001) (holding that the ILEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors).

The Commission has had the opportunity to address these issues in the recent § 252 arbitration between El Paso Networks, LLC and SWBT. In the revised Arbitration Award, the Arbitrators rejected SWBT attempts to avoid its unbundling obligation with respect to dark fiber by claiming it was not required to perform certain activities that in its view constituted impermissible construction. For example, in finding that SWBT was obligated to splice dark fiber for EPN, the arbitrators ruled as follows:

The Arbitrators find that EPN is similarly not asking SWBT to construct additional facilities. EPN is only asking for access to fiber that is already there. The Arbitrators agree with EPN that termination does not require deployment of any new capital facilities or new construction. The Arbitrators do believe, however, that termination involves field work which SWBT already does on a daily basis. Therefore, the Arbitrators find no harm in requiring SWBT to terminate dark fiber for those facilities that are already in existence.¹⁵

Thus, the parity requirement of the FTA and FCC rules includes the tasks involved in performing routine network upgrades and modifications to electronics and other facilities that SWBT normally performs for its customers.¹⁶ Therefore, if an ILEC “upgrades its own network (or would do so upon receiving a request from a ... customer), it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they

¹⁵ Docket No. 25188, Revised Arbitration Award at p. 134. See also docket No. 25188 Revised Award at p. 133 (In rejecting the SWBT argument that terminating dark fiber requires construction the Arbitrators noted that “SWBT argued that it should not be required to construct dark fiber for use as a UNE. The Arbitrators do not believe that obligating SWBT to provide UNE dark fiber as described above would require SWBT to construct dark fiber for EPN for use as a UNE. In the CoServ Arbitration Award, the Arbitrators found that terminating dark fiber does not constitute constructing new transport facilities. Additionally, the Arbitrators also found that CoServ was not asking for SWBT to construct additional facilities; CoServ was only asking for access to dark fiber in those facilities that SWBT has already deployed.”) (internal citations omitted).

¹⁶ See, e.g., *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 31 F.Supp.2d 839, 856 (D. Or. 1998) *rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999)

continue to receive at least the same quality of service that the [ILEC] provides to its own customers.”¹⁷ The parity requirement of § 51.311(b) already mandates that network modifications be made so that CLECs can obtain access to SWBT’s underlying network elements at the same level of quality that SWBT provides to itself.

The Eight Circuit Opinion Vacating the FCC’s Superior Network Rule Does Not Alleviate SWBT’s Obligation to Modify, Improve, and Expand its Existing Network Elements

Consistent with the 8th Circuit decisions in *Iowa I*¹⁸ and *Iowa II*,¹⁹ the Act’s nondiscrimination obligation in § 251(c)(3) does not require that ILECs construct a “superior network.” However, the activities necessary to afford CLECs access to UNEs do not involve construction of a superior network. In fact, courts recognize that ILECs are required to modify or expand their networks at existing quality levels and that the construction of new facilities does not mean providing a superior network.²⁰ Indeed, “new facilities could be necessary just to create equivalent interconnection and access.”²¹ In short, SWBT is obligated to perform activities it considers “construction” in order to create equivalent access, but is not required to construct superior access.

To elaborate, although *Iowa I* and *Iowa II* vacated the FCC’s superior quality rules, these decisions did not absolve ILECs from their obligation to treat CLECs in a nondiscriminatory

¹⁷ 31 F.Supp.2d at 856; *see also* 46 F.Supp.2d at 1025.

¹⁸ *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 812-13 (8th Cir. July 18, 1997) (“*Iowa I*”).

¹⁹ *See Iowa Utilities Board v. FCC*, 219 F.3d 744, 758 (8th Cir. July 18, 2000) (“*Iowa II*”).

²⁰ *See Iowa I* at 813 n.33; *see also US West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 968, 983 (D.Minn. Mar. 30, 1999); 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856; *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 1998 WL 1806670 *4 (W.D. Wash. 1998); *MCI Telecommunications Corp. v. US West Communications, Inc.*, 1998 WL 34004509 *4 (W.D.Wash 1998).

²¹ 55 F.Supp.2d at 983.

manner and at parity, as the Act²² and FCC rules require,²³ with respect to routine network modifications and upgrades that are needed so that CLECs can access UNEs on an equivalent basis. Although *Iowa I* stated that the Act only requires unbundled access to an ILEC's existing network, "not to a yet unbuilt superior one,"²⁴ this statement alone does not relieve an ILEC of its duty to perform routine network modifications and upgrades in order to make an existing network element available to the same extent as it does for itself and its customers.²⁵

In fact, the decision does not suggest this at all. *Iowa I* holds that ILECs cannot be required to *substantially* alter their networks in order to provide *superior* quality interconnection or *superior* quality access to network elements.²⁶ Furthermore, the *Iowa I* court limited this holding and explained that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include *modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.*"²⁷ When the court revisited this decision in *Iowa*

²² 47 U.S.C. § 251(c)(3).

²³ 47 C.F.R. § 51.311(a)&(b); *Local Competition Order* ¶¶ 312 (stating that Act's requirement that ILECs "provide nondiscriminatory access to network elements on an unbundled basis" refers to the physical or logical connection to the element and the element itself.) & 313 (finding that ILECs must provide access and UNEs that are at least equal-in-quality to what the ILECs provide themselves unless it is technically infeasible to do so which the ILEC must demonstrate); see also UNE Remand Order ¶¶ 490-491.

²⁴ *Iowa I*, 120 F.3d at 812-13.

²⁵ See, e.g., 31 F.Supp.2d at 856; 46 F.Supp.2d at 1025.

²⁶ See *US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999) ("*US West*") (citing *Iowa I*, 120 F.3d at 813 n.33).

²⁷ See *Iowa I*, 120 F.3d at 813 n.33 (emphasis added) (citing First Report and Order, ¶198); see also *US West*, at *8 (noting that the Eighth Circuit endorsed the FCC's statement that the obligations imposed by section 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities "to the extent necessary to accommodate interconnection or access to network elements"); 55 F.Supp.2d at 983 (same); 31 F.Supp.2d at 856 (same); 1998 WL 1806670 *4 (same); 1998 WL 34004509 *4 (same).

II, it simply reaffirmed its opinion. In doing so, the *Iowa II* court noted that its ruling was limited in its applicability because “*the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of interconnection provided.*”²⁸

Hence, the crucial limitation established in the *Iowa I* and *Iowa II* decisions requires that an ILEC (in treating CLECs at parity and in a nondiscriminatory manner²⁹) make those modifications to its facilities that are necessary to accommodate interconnection or access to network elements, but does not require the ILEC “to provide superior interconnection or access by substantially altering its network.”³⁰ As the Court in *US West* found, the proper interpretation of this limitation requires that the term “necessary” be given a meaning consistent with FCC precedent.³¹ Significantly, the FCC deems equipment is “necessary” for interconnection or access to unbundled network elements within the meaning of 251(c)(6) “if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements.”³² Thus, applying this FCC definition of the word “necessary” within the context of the *Iowa I* and *Iowa II* limitation means that modifications or expansions to equipment are *necessary* because a CLEC cannot obtain interconnection or access to UNEs without them.

²⁸ See *Iowa II*, 219 F.3d at 758 (emphasis added).

²⁹ See 47 C.F.R. § 51.311(a)&(b); see also, e.g., 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856.

³⁰ See *US West* at *8.

³¹ See also *US WEST* at *8 (citing Local Competition Order at ¶ 59) (concluding that the state commission’s interpretation of the word “necessary” as it applied to the *Iowa I* limitation was appropriate because it tracked the FCC’s definition of necessary in the context of 251(c)(6)). Subsequent to this court’s decision, the FCC modified its definition of the term necessary in the *Fourth Report and Order* as discussed herein. See *Fourth Report and Order* ¶ 21.

³² See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204, 16 FCC Rcd 15435, ¶ 21 (rel. Aug. 8, 2001) (“*Fourth Report and Order*”).

This is the exact situation that CLECs face with respect to SWBT's new "no facilities" policy, and the *Iowa I* and *Iowa II* limitation directly applies because CLECs cannot access the associated DS1 UNE loops if SWBT does not make the same basic network modifications and upgrades for CLECs that SWBT performs for its retail customers.³³ Because these modifications are basic and routinely offered to ILEC retail customers, such modifications do not involve substantial alteration to an ILEC network and the ILEC may not refuse to provision UNE orders on the grounds that the request involves providing superior access. Indeed, a CLEC is not requesting that the ILEC provision network facilities that are superior in quality to that which the ILEC provides to itself or build a new, superior network because the ILEC is already and routinely performing the same functions in order to provide service to their retail customers over similar facilities. As SWBT makes clear in its new Methods and Procedures, "from an engineering perspective, these UNEs are simply DS1s that happen to be CLEC UNEs."³⁴ In short, these facility modifications and capacity upgrades are necessary to create equivalent, not superior, quality of interconnection or access to network elements.

Thus, in the *UNE Remand Order*, the FCC provides several examples where ILECs must construct facilities to afford CLECs access to UNEs. For instance, the FCC found that *Iowa I* allowed it to require ILECs to condition loops for DSL service, and explicitly rejected the ILEC

³³ See 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856. Notably, the Sixth Circuit's recent September 30, 2002 opinion in *Michigan Bell Tel Co. v. Strand*, 2002 WL 31155092 *10 (6th Cir. Sept. 30, 2002) is inapposite and does not change this result. In *Michigan Bell*, the court found that Ameritech could price discriminate when there was no retail analogue. *Id.* In particular, the court found that because Ameritech does not provide loop conditioning to its retail customers, there was no retail analogue and thus it was not discriminatory if Ameritech assessed CLECs construction charges and did not assess its retail customers such charges. *Id.* In contrast to *Michigan Bell* where there was no retail analogue, a retail analogue exists when ILECs reject CLEC requests for UNE circuits on the basis that no facilities exist. In fact, when Verizon provides a "no facilities" response to a CLEC request for high capacity UNEs, Verizon instructs CLECs to purchase such services out of retail tariffs. Similarly, CLECs in this proceeding purchased special access service from SWBT when their DS1 UNE loop orders were rejected due to "lack of facilities."

argument that such conditioning granted competitors superior access to the ILEC network. The FCC found that loop conditioning “rather than providing the CLEC a ‘superior quality’ loop, in fact enables a requesting carrier to use the basic loop.”³⁵ Similarly, the FCC rules require ILECs to construct a single point of interconnection to provide CLECs access to UNE subloops. The FCC found that “to the extent there is not currently a single point of interconnection that can be feasibly accessed by a requesting carrier, ... we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers.”³⁶

Furthermore, the FCC has recognized that ILECs must expand or modify their facilities in order to provide nondiscriminatory access. For instance, under § 224 of the FTA, ILECs must provide CLECs with nondiscriminatory access to poles, ducts, conduits or rights-of-way.³⁷ The FCC has found that “because [ILECs] can expand [their] capacity to suit their needs, ‘[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers....’”³⁸ In crafting its rules implementing § 224 of the FTA, the FCC interpreted the Act “to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.”³⁹

This Commission has also considered the application of the *Iowa I* decision vacating the FCC’s superior access rule in the EPN-SWBT interconnection agreement arbitration. In that

³⁴ SWBT “UNE DS1 Interim Procedures.” See Attachment 2.

³⁵ *UNE Remand Order*, ¶ 173.

³⁶ *UNE Remand Order*, ¶ 226

³⁷ See 47 U.S.C. §§ 251(b)(4) & 224(f)(1).

³⁸ 1998 WL 1806670 *4 (quoting *Local Competition Order* ¶ 1162); 1998 WL 34004509 *4 (same).

³⁹ *Local Competition Order* ¶ 1163; see also 1998 WL 1806670 *4; 1998 WL 34004509 *4.

case, the Arbitrators dismissed SWBT's objection to EPN's language that requires SWBT to take EPN's forecasts for dark fiber into account when modifying its network. The Arbitrators rejected SWBT's argument that EPN was requesting "a network that is superior in quality to that which it provides itself." Instead the Arbitrators observed that because SWBT "builds, maintains, and upgrades when necessary, its own network so that it can provision telecommunications products and services for all its customers," SWBT has "a distinct advantage in that it is able to adjust its network in a timely manner so as to satisfy its customers. EPN is asking SWBT to take its forecast into consideration so that EPN, in turn, has the same opportunity to service its customers in the same timely manner as SWBT."⁴⁰ On that basis the Arbitrators found that "SWBT shall accept EPN's forecasts and give them consideration when SWBT formulates its plans to accommodate foreseeable demand."⁴¹

Accordingly, the FTA, the FCC's rules, applicable judicial determinations, and this Commission's consideration of the issue all recognize that SWBT must make network modifications or upgrades because such changes are necessary to accommodate CLEC access to network elements.⁴² Further, SWBT's failure to do so is patent discrimination because such

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Such authority is also supported by other FCC and state decisions. *See, e.g., Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, n.1658 (Chief, Wireline Competition Bureau rel. July 17, 2002) ("Virginia Arbitration Order") (ordering that Verizon must provide the multiplexing equipment because the requesting carrier is entitled to a fully functioning loop); *WorldCom Tech., Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000) (ordering Ameritech to install SONET electronics to provision a request for unbundled transport), *aff'd*, *Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002); *U.S. West Comm. Inc.*, Docket Nos. UT-003022 & UT-003040, Commission Order, 2001 WL 1672340 *12 (Wash. U.T.C. July 24, 2001) (holding that the ILEC is still required to provide access to UNEs within its existing

network modifications do not involve providing superior access to network elements in that they are routinely made to accommodate requests for services made by the ILEC's customers.

B. PURA's competitive safeguards prohibit discrimination in the provision of UNEs, and unreasonable delays in delivery of competitive services to Texas customers.

In addition to the FTA rules and requirements, SWBT also is obliged to provide nondiscriminatory interconnection and access to UNEs pursuant to several sections of PURA. SWBT's new provisioning procedures violate each of these provisions of State law. First, PURA requires, at a minimum, that SWBT unbundle its network to the extent required by the FCC.⁴³ As demonstrated above, SWBT's new procedures do not comply with the unbundling obligations established by the FCC and thus also fail to meet PURA's standards.

Second, PURA provides that the Commission "shall ensure that the rates and rules of an [ILEC] ... are not unreasonably preferential, prejudicial, or discriminatory; and ... are applied equitably and consistently."⁴⁴ The new procedures for DS1 UNE loop provisioning imposed by SWBT constitute an ILEC rule that is applied in a preferential, prejudicial and discriminatory manner. SWBT provisions its own DS1 level services (including tariffed special access services) in a more favorable manner than it provisions DS1 UNE loops to CLECs. SWBT's preference for its own services discriminates against CLECs and prejudices the CLECs' ability to serve customers using UNEs.

network even if it must construct additional capacity within its network to make the UNEs available to competitors).

⁴³ PURA § 60.021.

⁴⁴ PURA § 60.001(1) & (2).

Third, SWBT's new procedures violate the "Incumbent Local Exchange Company Requirements" set forth in PURA § 60.161. That provision provides that an ILEC may not unreasonably:

- (1) discriminate against another provider by refusing access to the local exchange;
- (2) refuse or delay an interconnection to another provider;
- (3) degrade the quality of access the company provides to another provider;
- (4) impair the speed, quality, or efficiency of a line used by another provider
- ...
- (6) refuse or delay access by a person to another provider.⁴⁵

SWBT's DS1 UNE loop procedures violate each of these PURA provisions. The procedures discriminate against CLECs, as described above. The procedures either eliminate or delay a CLEC's ability to gain access to local exchange customers using UNEs. SWBT's refusal to perform necessary modifications that permit CLECs to provide DS1 level services using UNEs degrades the quality of the services CLECs may offer using UNEs, and decreases the efficiency of CLEC provisioning of high capacity services. Finally, the SWBT procedures unreasonably delay customers' access to CLEC services by refusing to provision orders that, if properly fulfilled, would permit the customer to receive CLEC local service without unnecessary delay.

C. SWBT's New Procedures Contravene Its Compliance With The Loop Provisioning Requirements of the § 271 Competitive Checklist.

In its Texas 271 Order,⁴⁶ the FCC found that SWBT satisfied Item 4 of the FTA § 271 Competitive Checklist, which requires that SWBT provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."⁴⁷

⁴⁵ PURA § 60.161 (1)-(4) & (6).

⁴⁶ *Texas 271 Order*, ¶¶ 246-330.

⁴⁷ FTA § 271(c)(2)(B)(iv).

The FCC's and the Texas PUC's determination that SWBT satisfied Checklist Item 4 regarding provision of unbundled local loops was premised on SWBT's then current performance in provisioning DS1 UNE loops. SWBT's performance necessarily included its then current practice(s) for determining what loop conditioning would be performed as part of provisioning a DS1 UNE loop (e.g., splicing, removal of bridge taps, addition of repeaters, cable throws, etc.).

The FCC and this Commission were persuaded that SWBT met Checklist Item 4 by: (1) the terms of SWBT's T2A obligations; and (2) the level of its current performance of its obligations, as determined by the Performance Measurements ("PMs") adopted by the PUC. These measurements include PM 58 (Percent SWBT Caused Missed Due Date) and PM 60 (Percent Missed Due Dates Due to Lack Of Facilities (LOF)). As explained in detail in the accompanying Affidavit of Tad J. Sauder, neither of these measurements adequately captures SWBT's performance or the marketplace reality experienced by Texas CLECs as a result of SWBT's recent change in DS-1 loop provisioning practices.

Performance Measurement 60, which attempts to capture the lack of facilities scenarios, fails because it only includes completed service orders in the measurement. Under the new DS-1 loop provisioning practices employed by SWBT, no completed service orders are generated in connection with these orders, so none of these instances would be captured under PM 60. Similarly, although PM 58 includes orders that are canceled after a SWBT caused missed due date, Mr. Sauder attests that SWBT has assigned either "CLEC caused" or "end user caused" Jeopardy Codes to the vast majority of his company's affected DS-1 loop orders. As such, and as Mr. Sauder concludes, if SWBT is utilizing missed due date codes (to which CLECs would have little insight) consistent with those Jeopardy Codes assigned to his company's orders, it is likely these DS-1 loop order "no facilities" occurrences are not being captured in PM 58 either.

The Performance Measurement Plan included within the T2A has been traditionally relied upon by both the FCC and this Commission to capture incidents of backsliding by SWBT in the post-271 market. However, with respect to how negatively SWBT's new DS1 UNE loop provisioning procedures impact CLECs, the very performance measurements that should reveal the impact simply do not. Rather, SWBT has masterfully designed various measurements to shield SWBT from liability for its discriminatory policies and practices regarding CLEC ordering and provisioning. Additionally, SWBT has devised away to characterize various data in such a way to exclude it from performance results. ⁴⁸ In any event, Performance Measurements will not capture, prevent, or penalize the discriminatory practices now being undertaken by SWBT. SWBT's new DS1 UNE loop provisioning procedures have resulted (immediately upon their implementation) in an extreme decline in the loop provisioning performance upon which SWBT's Texas 271 approval was based, even if that performance failure is not reflected in the relevant Performance Measurements.

The change in the way SWBT provisions DS1 loops over two years into the T2A, a change that results in significant instances of UNE loop order returns for "no facilities," violates SWBT's § 271 obligations. SWBT's unilateral alteration of its DS1 provisioning procedures has only been implemented in the five SWBT states where the company is already in the long distance market. SWBT's actions represent an obvious example of the kind of post-271 backsliding that the Texas Commission has worked strenuously to prevent.

The loop conditioning modifications SBC now refuses to perform when it provisions DS1 loops were at the time of the Texas 271 Order, and should remain, part of the normal DS1 UNE

⁴⁸ Moreover, the self-reporting aspect of the performance measurement scheme in Texas lends itself to the output of performance results skewed in the favor of the reporting party. The analysis of PM 58 and PM 60, in the context of this Complaint, is evidence of this and clearly illustrates that performance measurements are not necessarily the post-271 safeguards they were expected to be

loop provisioning process. However, if SBC believes that these functions should no longer be automatically included in its provisioning of DS1 loops, it could seek approval from the PUC to offer them separately from the loop, at TELRIC based rates, in its new interconnection agreements. SWBT has not done so. Instead, it has unilaterally, and without notice to CLECs, changed its method of DS1 loop provisioning, to the extreme prejudice of CLECs.

Thus in addition to violating its FTA § 251(c)(3) and PURA obligations to provide nondiscriminatory access to UNEs, SBC's policy change constitutes a violation of its contractual obligations and its FTA §271 commitments to the FCC and Texas PUC.

D. CLECs' Interconnection Agreements with SWBT Do Not Permit SWBT to Deny CLEC Requests for UNEs Merely Because Facilities Need Some Modifications.

The CLEC Complainants are parties to interconnection agreements with SWBT that require unrestricted, nondiscriminatory access to UNEs.⁴⁹ Section 55.1 of the General Terms & Conditions attachment of the Agreements provides that SWBT will provide "incumbent LEC Network Elements to CLEC on an unbundled basis on rates, terms and conditions set forth in this Agreement that are just, reasonable, and non-discriminatory." The UNE Attachment, at section 2.4, requires SWBT to:

provide the requested elements with all the functionality, and with at least the same quality of performance and operations systems support (ordering, provisioning, maintenance, billing and recording), that SWBT provides through its own network to its local exchange service customers receiving equivalent service, unless CLEC requests a lesser or greater quality of performance through the Special Request Process.

⁴⁹ As noted above, the Complainants are parties either to the T2A, or to agreements based on the AT&T agreement approved in the Mega-Arbitration or the agreement approved in the Waller Creek arbitration. The contract provisions referenced herein and relied upon by the Complainants are exactly the same in each of the Complainants' interconnection agreements.

These provisions establish a parity standard for judging the Agreements' nondiscrimination provisions: SWBT must provide the same service quality and support to CLECs ordering UNEs as it provides for its own services.

SWBT's new DS1 UNE loop procedures fail miserably to meet the parity standard. Since SWBT implemented them, the new procedures have resulted in an enormous increase in CLEC DS1 UNE loop order returns. There are, SWBT contends, "no facilities" available for numerous CLEC services that require DS1 loop functionality. On the very same loop paths, however, there are ample facilities for SWBT to provision its own special access service, which is functionally identical to the DS1 UNE loops requested by the CLECs.

In addition, UNE Section 2.4 also points out the flaw in SWBT's argument that CLECs should use the Special Request process to overcome SWBT's "no facilities" determinations. As Section 2.4 states, CLECs may use the Special Request process if they desire a "lesser or greater quality of performance" than SWBT provides for itself. The Complainants are in no way seeking a lesser or greater level of DS1 performance than SWBT provides for itself over its 4-wire digital loop facilities. Rather, CLECs are seeking only the standard DS1 functionality that they have every reason to expect from a DS1 UNE loop. Until SWBT's recent change in procedures, SWBT conditioned loops as necessary to provision DS1 UNEs in a manner at parity with its own DS1-level services. The changes, rearrangements, or other modifications necessary to provision DS1 UNE loops were not (nor should they have been) considered as a revision in the "quality of performance" of the UNE. Rather, the modifications were considered merely the network changes required to condition a loop for DS1-level digital service.

The language of the Special Request section of the Agreements, Attachment UNE Section 2.22, also provides that the Special Request process is intended for "[a]ny request by a

CLEC for an *additional* unbundled Network Element.” DS1 UNE loops are not an *additional* UNE, but rather one of the standard UNE offerings. The Special Request process, with its extended timelines and detailed procedures, is designed to address situations where the CLEC requests a new UNE not previously available under the Agreements. It was not intended to slow down the normal provisioning process for existing UNEs, which includes the loop conditioning activities SWBT now refuses to undertake.

The Special Request process may also be used by a CLEC to seek UNEs “[w]here facilities and equipment are not available.” Section 2.22. As discussed above, the new SWBT DS1 UNE loop procedures apply in many circumstances where “facilities and equipment” *are* available, but SWBT has declared its unwillingness to modify the facilities and equipment for provision of the UNE loop. SWBT should not be permitted to bootstrap CLECs into the long and arduous Special Request process by imposing a new and nonsensical definition of what it means for facilities and equipment to be “not available.” When a CLEC orders a DS1 UNE loop and the loop requires modifications, the Agreements simply do not provide that the CLEC must initiate the Special Request process to ensure that its loop is timely provisioned.

E. SWBT’s New Texas DS1 UNE Loop Procedures Are In Stark Contrast to SBC’s “Pre-271” Loop Modification Policies in the Ameritech States.

In October 2000, SBC’s Ameritech units in Illinois, Indiana, Michigan, Ohio and Wisconsin announced, in Accessible Letter CLECAM00-153, an “Unbundled Network Element Facility Modification & Construction Policy Update” (the “SBC/Ameritech Policy,” attached hereto as Attachment 3). Unlike the recently imposed Texas procedures, the SBC/Ameritech Policy was publicly announced, and included the following explicit objectives: “To ensure no discrimination between retail and wholesale customers. ... [To] significantly reduce the number of canceled CLEC UNE orders due to ‘no facilities available.’”

To achieve these objectives, SBC established a policy to “make modifications and engage in construction to provision UNEs according to the following categories.” The categories included “simple modifications of facilities,” “complex facilities modifications,” and “new build.” The SBC Ameritech Policy provides that “simple” and “complex” modifications will be completed as part of UNE provisioning, i.e., orders will not be returned as LOF due to the need for such modifications. The only basis for LOF return under the Policy is if “[c]onstruction of a new telecommunications system to a physical location is required because there are no existing physical facilities in place or planned to be in place to provide telecommunications services to SBC/Ameritech retail or wholesale services.” (emphasis in original)

The SBC/Ameritech Policy is strikingly different from the new SWBT DS1 UNE loop procedures. For example, the SBC/Ameritech “complex” modification category includes modifications that would result in a LOF return under the new Texas procedures. Complex modifications include: (a) “Reroute of facilities (requires engineering and physical work in field to provision order)”; (b) “Addition of electronics to provide additional capacity over an existing facility to provision a UNE element (requires engineering, ordering and physical installation of new equipment, and possible rerouting of existing retail services; (c) “placing terminal or apparatus case”; (d) “placing pair gain device”; (e) “addition and removal of repeaters.” Under the new Texas procedures, if SWBT determines any one of those modifications is necessary, it would result in a LOF return of the CLEC’s DS1 UNE loop order.

SWBT cannot claim that its newly identified justification for refusing to provision orders based on “no facilities” is standard in the industry. In fact, they are not even standard within SBC. In states where SBC has not yet attained interLATA authority, it appears much more willing to accommodate reasonable modification procedures to “ensure no discrimination

between retail and wholesale customer” and to “significantly reduce the number of canceled CLEC UNE orders due to ‘no facilities available.’” In states like Texas, where SWBT is already in the interLATA market, the company is retrenching and attempting to reverse current practices that are intended to achieve the same pro-competitive objectives. Moreover, it is important to note that the date included on SWBT’s “UNE DS1 Interim Procedures” is October 7, 2002, the *day before* the expiration of the SBC Ameritech Merger Conditions. Once the Merger Conditions’ calls for region-wide competitive policies expired, SWBT apparently was quick to alter its procedures in the SWBT region.

V. LIST OF DISCRETE ISSUES IN DISPUTE

The CLEC Coalition files this post-interconnection dispute resolution proceeding to resolve a single issue: whether SWBT will be permitted to continue the illegal, discriminatory imposition of its new DS1 UNE loop provisioning practices and procedures. The Complainants rely on the provisions of their interconnection agreements, and on the statutes, rules, and decisions identified above to support their requests for relief. The proceeding should address the obligations of the parties under their current interconnection agreements, not the addition of new rates, terms, or conditions related to DS1 UNE provisioning. The CLEC Coalition seeks merely to return to the status quo as it was before SWBT’s unilateral shift to a discriminatory provisioning policy for DS1 UNE loops.

The interim ruling and the permanent relief requested by the CLEC Coalition are substantively the same, and can be summarized as follows. The CLEC Coalition respectfully requests an Order:

1. Requiring SWBT to immediately reinstate the DS1 UNE loop conditioning and provisioning procedures that were in practice prior to its recent institution of the “UNE DS1 Interim Procedures” reflected in SWBT’s Construction and Engineering Methods and Procedures, or any other practices similar to such procedures. If SWBT claims, as it has so far, that no “policy change” has occurred (and thus there is nothing to reinstate), the CLEC Coalition requests a ruling that SWBT treat “no facilities” determinations for DS1 UNE loop orders the same way it would if the order was for a SWBT retail DS1-level service or for SWBT’s special access service; and
2. Requiring that when a CLEC has ordered SWBT special access service due to imposition of the new “no facilities” procedures, the CLEC should be reimbursed for all additional costs associated with ordering and using the special access circuit that would not have been incurred if the CLEC’s DS1 UNE loop order had been properly fulfilled, and that the special access circuit be converted immediately and at no additional cost, for all purposes, to a DS1 UNE loop. If the CLEC did not order special access when its DS1 UNE loop order was returned LOF, the CLEC should be permitted to re-submit the DS1 UNE loop order and SWBT should be required to provision it on an expedited basis.

VI. CONCLUSION

For all the reasons stated, Allegiance Telecom of Texas, Inc., Birch Telecom of Texas, LTd., LLP, Capital Telecommunications, Inc., Cbeyond Communications of Texas, L.P., El Paso Networks, LLC, Logix Communications, NTS Communications, Inc., Tex-Link

Communications, Inc., XO Texas, Inc., and Xspedius Management Co. Switched Services, LLC. respectfully request that the Commission convene a hearing regarding their request for interim relief pursuant to P.U.C. PROC. R. 22.328, and that the Commission grant the relief requested herein and any other relief to which they are entitled.

Respectfully submitted,

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ATTORNEYS FOR THE CLEC COALITION

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Joint Complaint and Request for Interim Ruling was served on Ann E. Meuleman, General Counsel-Austin, Southwestern Bell Telephone Company, 1616 Guadalupe Street, Room 600, Austin, Texas 78701, on November 22, 2002, via hand delivery.

Bill Magness